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CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

14 NOV 1975

Mr. James M. Frey
Assistant Director for Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Frey:

Enclosed is a proposed report to Chairman Ribicoff, Senate Committee on Government Operations, in response to a request for our recommendations on S. 2068, a bill "To provide for public disclosure of lobbying activities to influence decisions in the Congress and the executive branch, and for other purposes," and S. 2167, a bill "To provide for the recording and public disclosure of lobbying activities directed at the Congress and the executive branch, and for other purposes."

Advice is requested as to whether there is any objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

SIGNED

George L. Cary
Legislative Counsel

Enclosure

Distribution:
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AMERICAN REVOLUTION BICENTENNIAL 1776-1976

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CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

Honorable Abraham Ribicoff, Chairman
Committee on Government Operations
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for our comments on S. 2068 and S. 2167, bills to regulate lobbying in connection with congressional and Executive action. This Agency, of course, defers to Congress on matters concerning lobbying directed at Congress. With respect to the regulation of lobbying directed at the Executive branch, our interest is limited to the concern that overbreadth of language will inhibit this Agency's foreign intelligence mission.

S. 2068 would establish a "Federal Lobbying Disclosure Commission" and would require individuals engaged in "lobbying" activities to file a notice of representation with the Commission, to maintain records on their activities, and to file quarterly reports with the Commission on their contacts. S. 2167 would require lobbyists to register and file reports with the Comptroller General.

S. 2068 and S. 2167 are very similar to two bills on lobbying introduced earlier this Congress--S. 774 and S. 815. This Agency submitted a report on these earlier bills, indicating that certain of their provisions could be construed broadly to raise potential conflicts with the Agency's statutory charter. Many of the same problems discussed in relation to S. 774 and S. 815 exist with respect to S. 2068 and S. 2167.

We are attaching a detailed statement on the various provisions of S. 2068 and S. 2167 and explaining why we cannot recommend favorable consideration of these bills in their present form.

The Office of Management and Budget has advised there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

George L. Cary
Legislative Counsel

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COMMENTS ON S. 2068 AND S. 2167

1. S. 2068 would establish a "Federal Lobbying Disclosure Commission" and would require individuals engaged in "lobbying" activities to file a notice of representation with the Commission, to maintain records on their activities, and to file quarterly reports with the Commission on their contacts. The scope of S. 2068 hinges upon the definition of "lobbying." Sections 101(b) and (j), taken together, define "lobbying" directed at the Executive branch as a communication to a Federal officer or employee in order to influence any action taken by such officer or employee with respect to any pending or proposed rule, adjudication, hearing, investigation, or other action in any Federal agency. The specific types of action enumerated in the definition--rules, adjudications, and so forth--suggest an intent to limit the bill to the administrative process--that is, "quasi-legislative," "quasi-judicial," or "administrative" agency action directly affecting private interests. Under the doctrine of ejusdem generis, the term "other action," also cited in the definition, would be confined to the same kinds of agency action as those specifically mentioned, e.g. licensing, issuing orders, imposing sanctions, and granting or withholding relief.

2. The Central Intelligence Agency was established by the National Security Act of 1947 to coordinate the intelligence activities of the United States; to correlate, evaluate, and disseminate foreign intelligence; and to perform other functions and duties related to foreign intelligence and affecting the national security. The Central Intelligence Agency is not a policy-making agency; though supplying U.S. policy-makers with intelligence assessments, it does not formulate or advocate policy positions. The Agency is not an administrative agency and does not perform regulatory or benefactory functions. Thus, if sections 101(b) and (j) were interpreted to apply strictly to influencing administrative agency action, the Central Intelligence Agency would have no direct interest in such regulation. Such coverage would be consistent with the apparent public interest objectives of the legislation.

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3. However, sections 101(b) and (j) could be interpreted to cover the internal administrative actions of all Executive agencies, such as those relating to agency management, personnel, or contracts. It could also be construed most broadly to cover "any action" taken by an Executive employee. If either of these constructions is intended, situations might arise in which the proposed regulations would conflict with this Agency's statutory charter. For example, it is possible that officials or representatives of a private company which has developed a new intelligence technology, e.g. an electronic collection device, would seek to demonstrate the feasibility and utility of the system to the Agency. Under sections 102(b)(3) and 104(a)(3), the communicating official would be required to disclose the subject matter of the communication. This would result in the disclosure of sensitive information and would conflict with the statutory authorities which charge the Director of Central Intelligence with the protection of Intelligence Sources and Methods (50 U.S.C. 403). To the extent that sections 102, 103, and 104 would require records and reports disclosing the identities of contacted Agency personnel, the regulations would conflict with 50 U.S.C. 403(j) which exempts the Agency from laws requiring disclosure of agency organization and personnel.

4. These comments apply with greater force to S. 2167, section 102(g) of which defines the policy-making process in the Executive branch as "any action taken by a Federal officer or employee ... with respect to any pending or proposed rule, rule of practice, adjudications, regulations, determination, hearing, investigation, contract, grant, or license." The inclusion of the terms "contract" and "rule of practice" suggest an intention to extend the coverage of S. 2167 beyond administrative agency action to agency management and contracting, matters not usually considered related to "lobbying" and which have traditionally been subject to different statutory regulations than those which apply to "lobbying activities."

5. Recommendations: If it is the intent of the Committee to apply these bills to administrative agency action, it is suggested that this scope be more clearly defined. If broader application is contemplated, however, it is requested that some accommodation be made for the considerations discussed above. Perhaps language could be included in the bill providing that nothing contained in the Act should be construed to require the disclosure of information which is prohibited or otherwise exempted from disclosure by law. The Agency is prepared to consult with the Committee in working out appropriate modifications.

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6. Because of its broader coverage, section 201 of S. 2167 raises more serious problems. S. 2068 has no comparable provision. Under section 201, certain Executive branch employees would be required to make detailed records of any "oral or written communication which pertains to any Federal agency activity or policy issue." These records, available for public inspection in an agency "public reading room," would contain the identities of the contacted employee and the outside party, the subject matter of the communication, and the action taken in response to the communications.

7. It is noted that this section abandons the terminology defined in and used throughout the rest of the bill in favor of new undefined terms. "Oral or written communication" is used in lieu of "executive communication" defined in section 102(1). The undefined terms "agency activity" and "policy issue" are substituted for the terms "executive policy-making process" defined in section 102(j). This shift in language and the potentially broad interpretation of the terms "agency activity" and "policy issue" could extend the requirements of section 201 to almost any kind of communication, including those which have no relation to attempts at influencing agency action directly affecting private rights. Such overbroad coverage would seriously impair this Agency's ability to function.

8. In the context of the policy issues and activities involved in the foreign intelligence mission, a requirement that communications by outsiders concerning "agency activity" or "policy issues" be made public would make impossible the essential confidentiality upon which this Agency's outside sources of information insist. Moreover, sensitive agency intelligence activities could not be kept secret, where communications regarding these activities are required to be made public. In addition, as discussed above with respect to sections 101(b) and (j) of S. 2068 and section 102(j) of S. 2167, the proposed disclosure of the identity of the contacted employee, the subject matter of the communication, and the action taken in response to the communication would conflict with statutory authorities pertaining to the protection of Intelligence Sources and Methods [50 U.S.C. 403] and exempting the CIA from laws requiring disclosure of Agency organization and personnel [50 U.S.C. 403(j)].

9. Recommendations: It is suggested that section 201 of S. 2167, if adopted, be strictly limited to lobbying activities by lobbyists and to communications designed to influence the quasi-legislative, quasi-judicial, and enforcement proceedings of administrative agencies. Indeed, this limitation is suggested by section 201(a)(2) which requires employees under GS-15 level to prepare records of communications "only to the extent that such communications pertain to their involvement in any rule-making, investigative, prosecutorial, or adjudicative function connected with a proceeding before any Federal agency or the courts." This limitation is not applied to officials over GS-15.

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